IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Veera Ram Vs. State of Rajasthan
(S.B. CRIMINAL APPEAL NO.222/1988)

S.B. Criminal Appeal under Section 374 against the judgment dated 19.5.1988 passed by the Additional Sessions Judge, Barmer in Sessions Case No.21/1988.

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Date of Judgment: APRIL 25,2007

P R E S E N T

HON'BLE MR.JUSTICE BHANWAROO KHAN

Mr.Pritam Solanki)
Mr.R.J.Poonia)for the appellant

Mr.L.R.Upadhyaya, Public Prosecutor

BY THE COURT:

1. The accused appellant Veera Ram has preferred this appeal against the judgment dated 19.5.1988 passed by the Additional Sessions Judge, Barmer whereby he has been convicted under Section 18 of the Narcotics, Drugs & Psychotropic Substances

Act (in short the N.D.P.S. Act) and sentenced him to undergo 10 years rigorous imprisonment and to pay fine of Rs. 1 Lac; in default thereof to further undergo 1 year rigorous imprisonment.

2. The brief facts of the prosecution case as unfolded during the trial are that on 30.6.1987 at about 4:00 P.M. the S.H.O. Ram Singh of Police Station, Chouhatan was on routine traffic checking at crossing of Kelnore, Chouhatan road accompanied with Maga Ram H.C. And police constables Ran Singh & Sukha Ram. During checking he received a secret information from an informant that one man dressed in white Dhoti having turban on his head is coming from Agore to Chouhatan having opium with him. After receipt of this information, he saw a man coming towards them, who after seeing them left the road, started going astray. They followed and intercepted him. On inquiry he revealed his name as Veera Ram S/o Hanvanta Ram Vishnoi resident of Chouhatan Agore.

3. On further inquiry he became nervous and admitted to have opium with him. Chhatar Singh and Dalpat Singh were called as Motbirs, in whose presence

Veera Ram took out the opium from his pocket. When weighed it found to be 55 gms. out of which 30 gms. was taken for chemical analysis. Both packets were sealed separately on the spot. A recovery memo and arrest memo was prepared by him. A case under Section 18 of the N.D.P.S. Act was registered and after due investigation challan was submitted.

4. In all 7 witnesses were produced by the prosecution in support of their case. The contraband recovered was found to be opium vide report Ex.P12. The accused in his statement under Section 313 of the Code of Criminal Procedure denied the recovery of the opium from his possession and pleaded that because of the enmity the police official are falsely implicating him. Two persons were examined in defence.

5. In support of the appeal learned counsel for the appellant argued that there is no independent witnesses to support the prosecution story and both the Motbirs P.W.4 Chhatar Singh and P.W.5 Dalpat Singh have been declared hostile and have not supported the story of the prosecution. The Investigating Officer has not complied with the statutory provisions of Sections

42,50 & 55 of the N.D.P.S. Act. There are material contradictions even in the statements of police officials, who are not sure about the place of recovery of opium, whether it was from the person of the accused or it was the accused himself, who took out the opium from his own pocket. The Investigating Officer, who received the secret information has neither transmitted the same to his higher police officers nor the same has been reduced to writing meaning thereby the total non-compliance of Section 42 of the N.D.P.S. Act. The recovered contraband was also not produced in the court during trial and the recovered opium had not remained intact after the recovery till it reached in the Forensic Science Laboratory for chemical examination.

6. The learned Public Prosecutor against the arguments advanced by the learned counsel for the appellant supported the judgment and conviction of the accused and contended that mere turning hostile of independent Motbirs would not lead the conclusion that otherwise corroborative evidence of the prosecution be thrown away. As per the arguments since it was accused, who himself personally took out the opium from his pocket the question of personal search of the

accused does not arise and no compliance of Section 50 is needed. The FSL report Ex.P12 clearly reveals that the recovered article was opium and the same was recovered from the possession of the accused. The trial court has rightly convicted the accused appellant.

7. Shorn of unnecessary details of the story, suffice it to say that firstly the prosecution is not certain about the recovery of opium i.e. to say whether it was given to the Investigating Officer by the accused suo moto by taking out the opium from his pocket or the opium was recovered by the personal search of the accused conducted by the Investigating Officer P.W.7 Ram Singh. The F.I.R. Ex.P11 reveals that it was accused, who when inquired about, took out the opium from his pocket, whereas in the statements in the court, P.W.7 Ram Singh, P.W.6 Ran Singh and P.W.1 Goma Ram have deposed that the opium was recovered from the personal search of the accused. Therefore, the mode of recovery itself becomes doubtful.

8. Be that as it may, the secret information was received by the Investigating Officer P.W.7 Ram Singh, while he along with other police officials was on routine

traffic checking, was neither reduced to writing nor after coming to police station and registering the case, the information so received was transmitted or forwarded to higher police officers. The requirement of Section 42 of the N.D.P.S. Act is not fulfilled. Secondly, treating the recovery of opium from the person of the accused, as per statements of P.W.7 Ram Singh, P.W.6 and P.W.1 Goma Ram given in the court, whether the Investigating Officer have complied with Section 50 of the N.D.P.S. Act or not is to be seen.

9. It is well settled by catena of judgments of the Apex Court that non-compliance of Section 42, 50 the N.D.P.S.Act do not vitiate the trial but it causes prejudice to the accused and renders the search illegal. The conviction and sentence of the accused based solely on the recovery of contraband cannot be sustained without complying with the provisions under Sections 42, 50 of the N.D.P.S. Act.

10. Section 42 enables certain officers duly authorised to enter into and search any building, conveyance or enclosed place without warrant, if officer has reason to believe from personal knowledge or

information given by any person and has taken down in writing any offence under Chapter IV of the N.D.P.S. Act has been committed, he may between sunrise and sunset do the act enumerated in (a) (b) (c) (d) of Clause (1). Sub Clause (2) mandates that if officer has taken down in writing under Sub Clause (1) he shall forthwith send a copy thereof to his superior officer. In State of Punjab vs. Baldev Singh reported in 1999(6) SCC 172 it has been held that any police official without any prior information conducts search under Cr.P.C. and causes arrest of a person in the normal course of investigation in which an offence is committed and on completion of that search if any contraband under the N.D.P.S. Act is recovered the requirement of Section 42, 50 will not be attracted. But if he has prior information, and has taken down it in writing or records grounds for his belief about the commission of offence under Chapter IV it is a must for the officer to comply with Section 42(2) of the N.D.P.S. Act and to send a copy of information within 72 hours to his superior. In State of Punjab Vs. Balbir Singh reported in 1994(3) SCC 299, it has been held,

> "Under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section

> 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

11. So far as the compliance of Section 42(2) of N.D.P.S. Act is concerned, it is clearly borne out from the record that it has not been complied with as after receipt of the information from the informant the Investigating Officer did not record the information but proceeded further and recovered the opium from the possession of the accused. After having come to the Police Station and registering the case against the accused he has not transmitted it to the higher police officer, which was mandatory under Section 42. The non-compliance is fatal for the prosecution and completely vitiates the conviction. In such circumstances the illicit contraband seized during the search cannot be used as evidence of proof of unlawful possession of that article.

12. In State of Punjab vs. Baldev Singh's case (supra) it has been decided by the Hon'ble Supreme

Court that Section 50 is applicable to the personal search of the accused and is clearly distinguishable from the search made from the bag, container, suitcase or premises.

13. All the witnesses of the prosecution including the Investigating Officer have stated that search of the accused was made and opium was recovered by him from his pocket, which means the personal search of the accused was made by the Investigating Officer and it was mandatory and compulsory for the Investigating Officer to have apprised the accused about his valuable right of his personal search to be made either before a Gazetted officer or a Magistrate. This compliance has not been done.

14. The Hon'ble Supreme Court in Baldev Singh's case(supra) in Para 57 has held that it is imperative for the empowered officer, who is acting on prior information to inform the person concerned of his right under sub-section (1) of Section 50 and failure to inform the person about this right causes prejudice to the accused and the failure to comply with this provision may not vitiate the trial but would render the

recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article. It has been further held that the use of evidence collected in breach of safeguard provided under Section 50 would render the trial unfair. Whether Section 50 is mandatory or directory it has been left open but it has been categorically decided that the search conducted in violation of Section 50 of the N.D.P.S. Act cannot be used as evidence of proof of unlawful possession of the contraband. Though any other material recovered during the search may be relied upon in other proceedings against the accused. About presumption under Section 54 of the N.D.P.S. Act it has been held that it can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with this mandate of Section 50 and illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the N.D.P.S. Act.

15. In the instant case as is revealed from the statements of the witnesses that neither the compliance

of Section 42 nor the compliance of Section 50 of the N.D.P.S. Act have been made by the Investigating Officer. It is a case of personal search and the opium recovered from the possession of the accused after being searched by the Investigating Officer and from personal possession of the accused the opium was alleged to have been recovered. The total non-compliance of both the statutory provisions of Sections 42 & 50 of the N.D.P.S. Act entitles the accused a rightof acquittal as per the decision of the Supreme Court in Baldev Singh's case(supra) and non-compliance of both the sections would vitiate the conviction as these provisions are to be followed and complied with strictly. In such circumstances the illicit contraband seized during the illegal search cannot be used as evidence of proof of unlawful possession of that article and does not entitle the prosecution to raise a presumption. The prosecution has failed to prove the charge levelled against the accused.

16. Above being the position and the discussion it is found that the prosecution has failed to comply with the provisions of Sections 42 & 50 of the N.D.P.S. Act and in absence of this the accused is entitled for

acquittal and appeal deserves to be accepted.

17. Resultantly, the appeal of the accused Veera Ram is allowed and the conviction and sentence passed against the accused appellant by the Additional Sessions Judge, Barmer vide order dated 19.5.1988 is set aside. The accused is on bail. His bail bonds stand cancelled.

(BHANWAROO KHAN) J.

BKS/-